



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2010-0816; FRL-9943-35-Region 4]

Air Plan Disapproval; Georgia:

Disapproval of Automatic Rescission Clause

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to disapprove a portion of a revision to the Georgia State Implementation Plan (SIP), submitted through the Georgia Department of Natural Resources Environmental Protection Division (Georgia EPD), on January 13, 2011, that would allow for the automatic rescission of federal permitting-related requirements in certain circumstances. EPA is disapproving Georgia's automatic rescission clause because the Agency has determined that this provision is not consistent with the Clean Air Act (CAA or Act) or federal regulations related to SIPs.

DATES: This rule will be effective **[insert date 30 days after date of publication in the Federal Register]**.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA-R04-OAR-2010-0816. All documents in the docket are listed on the www.regulations.gov web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be

publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Sean Lakeman, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Mr. Lakeman can be reached by telephone at (404) 562-9043 or via electronic mail at lakeman.sean@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On September 8, 2011, EPA took final action to approve portions of a requested revision to the Georgia SIP, submitted by Georgia EPD on January 13, 2011. *See* 76 FR 55572. Specifically, the portions of Georgia's January 13, 2011, SIP submittal that EPA approved incorporated two updates to the State's air quality regulations under Georgia's New Source Review (NSR) Prevention of Significant Deterioration (PSD) program. First, the SIP revision established emission thresholds for determining which new stationary sources and modification projects become subject to Georgia's PSD permitting requirements for their greenhouse gas (GHG) emissions. Second, the SIP revision incorporated provisions for implementing the PSD

program for the fine particulate matter (PM_{2.5}) national ambient air quality standards (NAAQS). EPA noted in its September 8, 2011 final rule approving portions of Georgia's January 13, 2011, SIP submittal that the Agency was still evaluating the portion of the SIP submittal related to a provision (at 391-3-1-.02(7)(a)(2)(iv)) that would automatically rescind portions of Georgia's SIP in the wake of certain court decisions or other triggering events (the automatic rescission clause), and consequently was not taking action on that provision in that final action. *See* 76 FR at 55573.

Specifically, at 391-3-1-.02(7)(a)(2)(iv), Georgia's rules read as follows: "The definition and use of the term 'subject to regulation' in 40 CFR, Part 52.21, as amended June 3, 2010, is hereby incorporated by reference; provided, however, that in the event all or any portion of 40 CFR 52.21 containing that term is: (i) declared or adjudged to be invalid or unconstitutional or stayed by the United States Court of Appeals for the Eleventh Circuit or for the District of Columbia Circuit; or (ii) withdrawn, repealed, revoked or otherwise rendered of no force and effect by the United States Environmental Protection Agency, Congress, or Presidential Executive Order. [sic] Such action shall render the regulation as incorporated herein, or that portion thereof that may be affected by such action, as invalid, void, stayed, or otherwise without force and effect for purposes of this rule upon the date such action becomes final and effective; provided, further, that such declaration, adjudication, stay, or other action described herein shall not affect the remaining portions, if any, of the regulation as incorporated herein, which shall remain of full force and effect as if such portion so declared or adjudged invalid or unconstitutional or stayed or otherwise invalidated or effected were not originally a part of this rule. The Board declares that it would [not] have incorporated the remaining parts of the federal regulation if it had known that such portion thereof would be declared or adjudged invalid or

unconstitutional or stayed or otherwise rendered of no force and effect.”

In a notice of proposed rulemaking (NPR) published on July 31, 2015, EPA proposed to disapprove the portion of Georgia’s January 13, 2011, submittal that would add the automatic rescission clause at Georgia Rule 391-3-1-.02(7)(a)(2)(iv) to the SIP. *See* 80 FR 45635. EPA is now taking final action to disapprove this portion of Georgia’s submittal.

In assessing the approvability of Georgia’s proposed automatic rescission clause, EPA considered two key factors: (1) whether the public will be given reasonable notice of any change to the SIP that occurs as a result of the automatic rescission clause; and (2) whether any future change to the SIP that occurs as a result of the automatic rescission clause would be consistent with EPA’s interpretation of the effect of the triggering action (e.g., the extent of an administrative or judicial stay) on federal permitting requirements at 40 CFR 52.21. These criteria are derived from the SIP revision procedures set forth in the CAA and federal regulations.

Regarding public notice, CAA section 110(l) provides that any revision to a SIP submitted by a State to EPA for approval “shall be adopted by such State after reasonable notice and public hearing.” *See* 42 U.S.C. 7410(l). Under Georgia’s automatic rescission clause, the SIP would automatically be revised as a result of a triggering action without public notice. To the extent that there is any ambiguity regarding how a court order or other triggering action impacts the federal permitting requirements at 40 CFR 52.21, that ambiguity will lead to ambiguity regarding the extent to which the triggering action results in a SIP revision (and indeed, whether a particular court ruling or other action in fact triggers an automatic SIP revision under Georgia’s automatic rescission clause). EPA concludes that Georgia’s automatic rescission clause would not provide reasonable public notice of a SIP revision as required by CAA 110(l), 42 U.S.C.

7410(l).

EPA's consideration of whether any SIP change resulting from the automatic rescission clause would be consistent with EPA's interpretation of the effect of the triggering action on federal permitting requirements at 40 CFR 52.21 is based on 40 CFR 51.105. Under 40 CFR 51.105, "[r]evisions of a plan, or any portion thereof, will not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part." However, the Georgia automatic rescission clause takes effect immediately upon certain triggering actions without any EPA intervention. The effect of this is that EPA is not given the opportunity to determine the effect and extent of the triggering court order or federal law change on the federal permitting requirements at 40 CFR 52.21; instead, the SIP is modified without EPA's approval.

Comments on the NPR were due on or before August 31, 2015. EPA received adverse comments on our proposed action, specifically on our proposed disapproval of the automatic rescission clause, from Georgia EPD. EPA also received comments from Georgia Industry Environmental Coalition, Inc. (GIEC). After considering the comments, EPA has decided to finalize our action as proposed. A summary of the comments and EPA's responses follow.

II. Response to Comments

Comment 1 : Georgia EPD contends that the public notice, the comment period, and the public hearing held for the rule change that adopted the automatic rescission clause at Georgia Rule 391-3-1-.02(7)(a)(2)(iv) satisfies CAA section 110(l) requirements. Specifically, Georgia EPD notes that it published public notices in several newspapers announcing an opportunity to comment on the proposed automatic rescission clause, held a public hearing, and addressed all

comments received during the public comment period. According to Georgia EPD, Georgia's rescission clause already went through public notice and comment, and there is no reason to require another round of public notice and comment simply because the automatic rescission clause is triggered.

GIEC likewise argues that Georgia EPD followed notice-and-comment procedures prior to the adoption of the automatic rescission clause that satisfy the requirements of CAA section 110(l). GIEC adds that the notice-and-comment procedures the Georgia EPD performed are indistinguishable from notice-and-comment procedures taken by the Tennessee Department of Environment and Conservation (TDEC) and the Louisville Metro Air Pollution Control District (LMAPCD) prior to enacting EPA-approved "automatic rescission" SIP provisions. GIEC contends that in approving the TDEC and LMAPCD provisions, EPA concluded that these agencies' respective prior notice-and-comment procedures satisfied CAA section 110(l) because they placed the public on notice that the respective SIPs would update automatically to reflect rescission-triggering actions. According to GIEC, because EPA concluded that TDEC and LMAPCD notice-and-comment procedures occurring *prior to* promulgation of their respective automatic rescission provisions satisfied CAA section 110(l), EPA cannot now conclude that the Georgia provision would not provide reasonable public notice under CAA section 110(l) when Georgia followed indistinguishable notice-and-comment procedures prior to promulgating that provision. GIEC contends that if EPA were to finally conclude in this rulemaking that the provision does not satisfy CAA section 110(l), such a conclusion would be arbitrary, capricious, an abuse of discretion, beyond the Agency's statutory and Constitutional limits, and otherwise contrary to law in light of the Agency's final determinations concerning the TDEC and LMAPCD SIPs.

Response 1: EPA disagrees with the Commenters' contention that the public notice and comment procedures associated with Georgia's adoption of the automatic rescission clause are sufficient to fulfill notice-and-comment requirements with respect to any future SIP revision resulting from the rescission clause's operation. While EPA does not dispute that Georgia EPD provided for public comment and a hearing when promulgating the automatic rescission clause at Georgia Rule 391-3-1-.02(7)(a)(2)(iv), that public comment opportunity did not—and could not—satisfy CAA section 110(l)'s public-notice-and-comment requirement with respect to future SIP revisions that would occur in the wake of a triggering action if EPA were to approve the automatic rescission clause into Georgia's SIP.

Contrary to the GIEC's suggestion, EPA's approval of the automatic rescission clauses adopted by TDEC and LMAPCD does not render EPA's disapproval of Georgia's automatic rescission clause unlawful or arbitrary and capricious. This is because Georgia's automatic rescission clause differs substantially from the automatic rescission clauses adopted by TDEC and LMAPCD. First, under the automatic rescission clauses adopted by TDEC and LMAPCD, no change to the SIP will occur until EPA publishes a Federal Register notice announcing that a portion of 40 CFR 52.21 has been stayed, vacated, or withdrawn. *See* 77 FR 12484 (March 1, 2012); 77 FR 62150 (October 12, 2012). As EPA explained in the final actions approving these clauses, because no change to the SIP will occur until EPA has published a Federal Register notice announcing the change in federal regulations, "the timing and extent of any future SIP change resulting from the automatic rescission clause will be clear to both the regulated community and the general public." *Id.* Second, unlike Georgia's proposed rescission clause, the automatic rescission clauses adopted by TDEC and LMAPCD make it clear to the public in

advance that any SIP change resulting from operation of the automatic rescission clause will be consistent with EPA's interpretation of how the triggering action impacted federal regulations.

In sharp contrast, the SIP changes resulting from operation of Georgia's proposed automatic rescission clause would happen automatically upon a triggering event without any public notice or EPA involvement. To the extent that there is any ambiguity regarding how a court order or other triggering action impacts the federal permitting requirements at 40 CFR 52.21, that ambiguity would lead to ambiguity regarding the specific revision to Georgia's SIP resulting from the triggering action. Not only does the public have no assurance that changes resulting from operation of the rescission clause would be consistent with EPA's interpretation of the applicable federal regulations, but after a change occurs, the exact change may not be clear to the public.¹ Furthermore, because ambiguity may exist regarding whether a particular court ruling or other action in fact triggers an automatic SIP revision under Georgia's automatic rescission clause, it may not be clear to the public whether the SIP has changed at all. Due to this ambiguity with respect to how the SIP might be revised under Georgia's proposed automatic rescission clause in the wake of a triggering action, EPA concludes that approval of the automatic rescission clause into Georgia's SIP would authorize future SIP revisions without reasonable public notice in violation of CAA section 110(l).

Comment 2: Georgia EPD states that after the D.C. Circuit issued its Amended Judgment in *Coalition for Responsible Regulation v. EPA*, 606 Fed. Appx. 6; 2015 U.S. App. LEXIS 11132 (D.C. Cir. 2015) (issued in response to the Supreme Court's decision in *Utility Air*

¹ Georgia's proposed automatic rescission clause would invalidate affected regulatory text, but would not actually remove the text from the regulation. Thus, if EPA were to approve Georgia's automatic rescission clause, it would be left up to the public, the regulated community, and ultimately, the courts, to determine whether and how a potential triggering action changed SIP requirements.

Regulatory Group v. EPA, 134 S. Ct. 2427 (2014)), EPA removed the affected portions of the federal PSD regulations without providing an opportunity for public comment because EPA deemed the action to be ministerial. *See* 80 FR 50199 (August 19, 2015). According to Georgia EPD, its rescission clause is no different than the process utilized by EPA in this rule to remove vacated permitting requirements from federal regulations following the Supreme Court’s decision.

Likewise, GIEC states that EPA’s removal of 40 CFR 52.21(b)(49)(v) as a ministerial act performed without notice-and-comment establishes that Georgia’s proposed automatic rescission clause, to the extent that it operates to invalidate Georgia’s incorporation of 40 CFR 52.21(b)(49)(v), would not contravene the public notice requirements of CAA section 110(l). Quoting from EPA’s Federal Register notice, GIEC points out that EPA characterized its removal of 40 CFR 52.21(b)(49)(v) from the CFR as a “necessary ministerial act” for which the Agency determined “it was not necessary to provide a public hearing or an opportunity for public comment.” GIEC further notes that EPA stated that “notice-and-comment would be contrary to the public interest because it would unnecessarily delay the removal from the CFR of the Tailoring Rule Step 2 PSD permitting provisions that the Supreme Court held were invalid.”

Response 2: EPA disagrees with these comments. The April 2015 EPA rule referenced by the Commenter did not revise a SIP submitted by a state for EPA approval. Thus, EPA’s rule was not subject to the procedures applicable to the revisions of SIPs. EPA’s rule revised section 40 CFR 51.166, which governs the content of state SIP submissions. But the EPA rule did not revise any SIP submitted by a state.

CAA section 110(l) requires without exception that “[e]ach revision” to a SIP submitted to EPA for approval be adopted by the state “after reasonable notice and public hearing.” *See* 42 U.S.C. 7410(l). Thus, there are no circumstances under which a state can revise its SIP without providing for public notice and comment on the revision.

EPA’s April 2015 action was not governed by section 110(l) of the CAA. That rule was promulgated under the Administrative Procedures Act (APA). Section 307(d) of the CAA says that the rulemaking procedures in that section “shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) and (B) of subsection 553(b) of Title 5.” Subparagraph (B) of this section in the APA provides that an agency need not provide notice of proposed rulemaking or opportunity for public comment when the agency for good cause finds that it is impracticable, unnecessary, or contrary to the public interest. *See* 5 U.S.C. 553(b). The APA does not address procedures for state actions to revise a SIP. Such actions are addressed in section 110(l) of the CAA.

In addition, although EPA’s rule was not subject to public comment under an exception in the APA, EPA’s action provided notice to the public of the change in the law. Georgia’s rescission clause provides no mechanism for informing the public of a change in state law.

Moreover, EPA did not deem all of the regulatory revisions needed to implement the D.C. Circuit’s April 10, 2015, Amended Judgment in *Coalition for Responsible Regulation v. EPA* to be ministerial. To the contrary, EPA explained in the final rule removing certain vacated elements from the federal PSD and title V regulations that the action did not fully address all of the revisions needed to implement the Amended Judgment because “[t]hose additional revisions to the PSD and title V regulations, although necessary to implement the Coalition Amended Judgment, are not purely ministerial in nature and will be addressed in [a] separate notice-and-

comment rulemaking, which will give the public an opportunity to comment on how the EPA proposed to address those portions of the *Coalition* Amended Judgment.” See 80 FR 50199, 50200 (August 19, 2015) (emphasis added). It is unclear how these more complex regulatory changes would be handled under Georgia’s proposed automatic rescission clause. In any event, even if Georgia had the authority to revise its SIP without providing for public notice and comment—which it does not—EPA’s decision to provide public notice but no opportunity for public comment on certain regulatory changes that it considered to be ministerial in no way supports Georgia EPD’s claim that it would be appropriate to deem all of the SIP revisions needed to remove vacated GHG permitting elements to be ministerial and to make such changes to Georgia’s SIP without any public notice or opportunity for public comment.

Finally, Georgia’s proposed automatic rescission clause is not limited to GHG permitting requirements. Rather, the clause applies broadly to actions that affect “all or any portion of 40 CFR 52.21” that contain the term “subject to regulation.” See Georgia Rule 391-3-1-.02(7)(a)(2)(iv). Thus, arguments regarding the alleged lack of ambiguity with respect to changes needed to address a triggering action pertaining to GHG permitting in particular are insufficient to support EPA’s approval of Georgia’s automatic rescission clause. Even if a ministerial change generally (or the particular change addressed in EPA’s action) could be exempt from the requirements of 110(l), because of the broad reach of Georgia’s rescission clause, it is impossible to conclude in advance that every automatic SIP change resulting from a triggering action would be ministerial.

Comment 3: Georgia EPD states that the occurrence of a triggering action and the resulting rescission would not be a change to the SIP because the triggering action and rescission

clause were already included in Georgia Rule 391-3-1-.02(7)(a)(2)(iv). Thus, according to Georgia EPD, the SIP is not being revised and therefore does not require approval from the Administrator.

Response 3: EPA disagrees with this comment. Georgia's proposed automatic rescission clause would automatically invalidate SIP language in response to a triggering action. Such a change would constitute a SIP revision.

Comment 4: GIEC states that "EPA's preliminary conclusion that the [automatic rescission clause] is inconsistent with 40 CFR 51.105 is incorrect because EPA has been and will be afforded adequate opportunity under the CAA and through other proceedings to ensure that any SIP change resulting from the automatic operation of the [rescission clause] is consistent with EPA's interpretation of the effect of the triggering action on the permitting requirements at 40 CFR 52.21." GIEC states that although the rescission clause is self-executing, "Georgia EPD would implement the effect of the provision's operation through permitting decisions that, under the Georgia SIP, are expressly subject to EPA notice, comment, and objection procedures." Specifically, GIEC contends that the "permit notice, comment, and objection procedures running to EPA's benefit provide EPA with ample opportunity to convey its interpretation of (and ultimately object to) the effect of any [rescission clause] triggering action on the permitting requirements at 40 CFR 52.21 if EPA's interpretation of such an action conflicted with that of the Georgia EPD."

Response 4: EPA disagrees with this comment. The CAA's SIP revision procedures are

distinct from the permit notice, comment, and EPA objection procedures. Indeed, section 110(i) of the Act specifically prohibits States and EPA, except in certain limited circumstances not applicable here, from taking any action to modify any requirement of a SIP with respect to any stationary source, except in compliance with the CAA's requirements for promulgation or revision of a state plan. *See* 42 U.S.C. 7410(i). Thus, contrary to the Commenter's contention, EPA's opportunity to object to a state permit cannot substitute for the state's compliance with the CAA's SIP revision requirements. Because Georgia's rescission clause would automatically revise the SIP in the wake of a triggering action, by the time EPA has the opportunity to review the permit for a particular source, it will be too late for EPA to "object" to a prior SIP revision brought about by a triggering action under Georgia's automatic rescission clause. Georgia cannot substitute permit review procedures for the procedural requirements governing SIP revisions at CAA section 110(l) and 40 CFR 51.105.

Comment 5: GIEC states that it is "highly unlikely" that any action triggering the rescission clause's operation would be subject to interpretation because the provision is triggered by clear and unambiguous occurrences – the withdrawal, repeal, or revocation of all or part of the term "subject to regulation" in 40 CFR 52.21 by executive or congressional action or its invalidation or stay by the Eleventh Circuit or D.C. Circuit Courts of Appeal. GIEC further states that the triggering actions do not become operative until any such action is "final and effective." GIEC comments that specifically with respect to GHG permitting requirements at 40 CFR 52.21(b)(49)(v), there was no ambiguity regarding the impact of the D.C. Circuit's Amended Judgment in *Coalition for Responsible Regulation*, which GIEC states would have been the "triggering action" if Georgia's automatic rescission clause had been approved by EPA.

According to GIEC, EPA had (and took) several opportunities to interpret the effect of the U.S. Supreme Court’s decision in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), on the permitting requirements at 40 CFR 52.21. GIEC points to various memoranda issued by EPA after the Supreme Court’s decision. GIEC also notes that as early as July 2014, EPA was on notice that the Georgia EPD construed *Utility Air Regulatory Group v. EPA* to invalidate 40 C.F.R. 52.21(b)(49)(v) and, accordingly, the SIP provision adopting that regulation was “no longer valid.” GIEC states that to its knowledge, EPA did not object to the Georgia EPD’s construction of *Utility Air Regulatory Group v. EPA* or the Division’s conclusions regarding the validity of 40 CFR 52.21(b)(49)(v) and the Georgia SIP provision incorporating it. GIEC concludes that in light of the straightforward and unambiguous manner in which Georgia’s rescission clause automatically operated as a result of the issuance of the D.C. Circuit’s Amended Judgment in *Coalition for Responsible Regulation* and the opportunities EPA had and took to determine the effect of *Utility Air Regulatory Group v. EPA* on the permitting requirements at 40 CFR 52.21, it is incorrect and appears somewhat disingenuous for EPA to preliminarily conclude that the rescission clause is inconsistent with 40 CFR 51.105.

Response 5: EPA disagrees with this comment. Contrary to GIEC’s contention, it is not “highly unlikely” that any action triggering operation of Georgia’s automatic rescission clause would be subject to interpretation. Among other actions, the automatic rescission clause would be triggered by a decision by the U.S. Court of Appeals for the Eleventh Circuit or the District of Columbia Circuit that declares a portion of 40 CFR 52.21 to be “invalid.” It is sometimes the case that the precise regulatory changes needed to address a court decision involve more than simply removing the provision at issue. Under such circumstances, the exact changes to SIP

requirements brought about by a triggering action under Georgia's automatic rescission clause would be unclear.

Rather than support GIEC's argument, the D.C. Circuit's Amended Judgment in *Coalition for Responsible Regulation v. EPA*, 606 Fed. Appx. 6; 2015 U.S. App. LEXIS 11132 (D.C. Cir. 2015) provides a useful example of a triggering action that involves some degree of ambiguity with respect to how it impacts regulatory requirements. The D.C. Circuit ordered, among other things, that "the regulations under review ... be vacated to the extent they require a stationary source to obtain a PSD permit if greenhouse gases are the only pollutant (i) that the source emissions or has the potential to emit above the applicable major source thresholds, or (ii) for which there is a significant emissions increase from a modification." 2015 U.S. App. LEXIS 11132, at 130-131. The Court further ordered "that EPA take steps to rescind and/or revise the applicable provisions of the Code of Federal Regulations as expeditiously as practicable to reflect the relief granted," and "that EPA consider whether any further revisions to its regulations are appropriate" in light of the Supreme Court's decision in *Utility Air Regulatory Group v. EPA*. *Id.* at 131. As explained above, EPA subsequently published a final action removing some, but not all, of the regulatory provisions impacted by the D.C. Circuit's Amended Judgment. *See* 80 FR at 50199. EPA explained in that notice that some of the regulatory changes needed to address the Amended Judgment are not purely ministerial. *Id.* at 50200. Because those regulatory changes involve the exercise of EPA's discretion to some extent, EPA intends to publish a separate Federal Register notice proposing those changes and soliciting public comment. *Id.*

Thus, contrary to GIEC's argument, it cannot be assumed that Georgia's automatic rescission clause would be triggered only by "clear and unambiguous occurrences." Rather, as

illustrated by EPA's efforts to respond to the D.C. Circuit's Amended Judgment in *Coalition for Responsible Regulation v. EPA*, there may be ambiguity with respect to the precise change to the permitting requirements in Georgia's SIP that would result from a triggering action under the automatic rescission clause. Because Georgia's automatic rescission clause would automatically change Georgia's SIP without public notice or EPA approval, any ambiguity regarding the regulatory impact of the triggering action would lead to ambiguity for regulated entities and the general public regarding the applicable SIP permitting requirements. This is especially true because while the automatic rescission clause would render the affected SIP provisions "invalid," the invalid text would not be removed or otherwise identified. Thus, it would not necessarily be clear to the public and regulated entities which SIP requirements remain in effect and which have been rendered invalid. Significantly, Georgia EPD (and Georgia courts) may disagree with EPA regarding the regulatory changes brought about by a triggering action under Georgia's automatic rescission clause. Thus, in the wake of a triggering action, Georgia's SIP may not be consistent with federal regulations. Given the uncertainty regarding what SIP revisions may result from the future operation of Georgia's automatic rescission clause, EPA cannot at this time "approve" such future SIP revisions in accordance with 40 CFR 51.105.

Comment 6: Georgia EPD comments that the Supreme Court issued its decision in *Utility Air Regulatory Group v. EPA* on June 23, 2014. Georgia EPD then states: "Ten months later, EPA still had not made any revisions to the federal PSD or Title V permitting requirements. As a result, on April 10, 2015, the D.C. Circuit Court issued an amended judgment in *Coalition for Responsible Regulation, Inc. v. Environmental Protection Agency*, 606 Fed. Appx. 6; 2015 U.S. App. LEXIS 11132, which vacated the Tailoring Rule to the extent that it requires sources to obtain PSD or Title V permits solely due to a potential to emit GHGs. This

prompted EPA to remove portions of those regulations from the Federal Register that were initially promulgated in 2010.” According to Georgia EPD: “Because EPA did not publish the Final Rule in the Federal Register until August 2015, without an immediate rescission clause, facilities would have been required to continue to follow the provisions in the Tailoring Rule for an additional 14 months after the Court vacated the rule. The [Georgia] EPD automatic rescission clause immediately did what it took EPA fourteen (14) months to do.”

Response 6: EPA disagrees with this comment. First, Georgia EPD’s comment reflects some misconceptions regarding the aftermath of the Supreme Court’s decision in *Utility Air Regulatory Group v. EPA*. Contrary to Georgia EPD’s suggestion, it was not EPA’s delay in revising the federal permitting regulations that resulted in the D.C. Circuit issuing its Amended Judgment. Rather, the D.C. Circuit was acting in response to the Supreme Court’s remand of the case back to the D.C. Circuit for issuance of an amended judgment and mandate consistent with the Supreme Court’s opinion. Consistent with standard judicial practice, following the Supreme Court’s remand of the case to the D.C. Circuit, EPA briefed the D.C. Circuit on what the agency considered to be the appropriate relief and waited for the D.C. Circuit to issue its Amended Judgment and mandate before taking action to remove provisions from the federal PSD and title V regulations. Notably, the parties to the litigation had differing views as to how the Supreme Court’s decision should impact the federal regulations. The D.C. Circuit issued its Amended Judgment on April 10, 2015, and EPA published a final rule in the Federal Register on August 19, 2015, removing those portions of the federal permitting regulations that the D.C. Circuit specifically identified as vacated. *See* 80 FR at 50199. However, as discussed above, EPA concluded that some of the regulatory changes needed to address the D.C. Circuit’s Amended

Judgment are not purely ministerial and therefore, EPA will address these changes in a separate notice-and-comment rulemaking. *Id.* at 50200.

Georgia EPD's comment also reflects some confusion regarding how Georgia's automatic rescission clause operates. Specifically, Georgia EPD apparently believes that the Supreme Court's decision, itself, was the triggering action under the automatic rescission clause. *See* Georgia EPD Comments at 2-3. Industry commenters, on the other hand, take the position that it was the D.C. Circuit's Amended Judgment that served as the triggering action. *See* GIEC Comments at 5. This disagreement between Georgia EPD and industry commenters underscores EPA's statement in the NPR that in addition to ambiguity regarding how the SIP might be revised in the future by operation of the automatic rescission clause, there may also be confusion regarding "whether a court ruling or other action in fact triggers an automatic SIP revision under Georgia's automatic rescission clause." *See* 80 FR at 45637. In contrast, when a SIP revision is made in accordance with statutory and regulatory requirements, there is no ambiguity regarding how and when the SIP is changed.

Regarding Georgia EPD's comment that without the automatic rescission clause, "facilities would have been required to continue to follow the provisions in the Tailoring Rule for an additional 14 months after the [Supreme] Court vacated the rule," EPA notes that shortly after the Supreme Court issued its decision, EPA announced that it would no longer apply or enforce federal regulatory provisions or the EPA-approved PSD SIP provisions that require a stationary source to obtain a PSD permit if greenhouse gases are the only pollutant: (i) that the source emits or has the potential to emit above the major source thresholds, or (ii) for which there is a significant emissions increase and a significant net emissions increase from a modification (e.g., 40 CFR 52.21(b)(49)(v)). Memorandum from Janet G. McCabe, Acting Asst.

Adm'r, Office of Air & Radiation, to Regional Administrators, Regions 1-10, *Next Steps and Preliminary Views on the Application of Clean Air Act Permitting Programs to Greenhouse Gases Following the Supreme Court's Decision in Utility Air Regulatory Group v. EPA* (July 24, 2014), at 2 (available at <http://www3.epa.gov/nsr/documents/20140724memo.pdf>). EPA further announced that it did not intend to continue applying regulations that would require that states include in their SIP a requirement that such sources obtain PSD permits.” *Id.* Georgia can exercise this same discretion with respect to enforcement of state GHG permitting requirements affected by the Supreme Court’s decision that the State has not yet had the opportunity to revise.

EPA appreciates Georgia’s desire to enable its SIP to automatically update to reflect actions that invalidate federal regulatory requirements. As Georgia EPD noted in its comments, there are some types of automatic updating provisions that EPA has found to be approvable. Specifically, EPA concluded that the automatic rescission clauses adopted by TDEC and LMAPCD were approvable because under those provisions, no change to the SIP will occur until EPA publishes a Federal Register document announcing that a portion of 40 CFR 52.21 has been stayed, vacated, or withdrawn. *See* 77 FR at 12485 (TDEC provision); 77 FR at 62153 (LMAPCD provision). Another acceptable approach would be to enable the SIP to automatically update to reflect revisions to 40 CFR 52.21.

Comment 7: Georgia EPD states that EPA has itself adopted a similar automatic rescission clause in a note to paragraph (b)(2)(iii)(a) of 40 CFR 52.21, which states: “By court order on December 24, 2003, the second sentence of this paragraph (b)(2)(iii)(a) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay.”

Response 7: EPA disagrees with this comment. The language in 40 CFR 52.21 cited by Georgia EPD has no substantive effect on the regulations and therefore is not an automatic rescission clause. It was added by EPA to clarify for the public that paragraph (b)(2)(iii)(a) was stayed indefinitely by the D.C. Circuit in *State of New York v. EPA*, No. 03-1380 and consolidated cases. As EPA explained in the Federal Register notice promulgating this language, “this rule is merely a housekeeping measure that reflects the court order. The action does not have any substantive effect.” 69 FR 40274, 40275. In any event, as discussed above, EPA’s procedural obligations derive from the APA, not the CAA. While the APA provides some exceptions from public notice requirements, CAA section 110(l) does not.

Comment 8: GIEC states that EPA’s August 19, 2015 promulgation of the Final Rule entitled “Prevention of Significant Deterioration and Title V Permitting for Greenhouse Gases: Removal of Certain Vacated Elements,” 80 FR 501999, compels the Agency to take final action to approve Georgia’s rescission clause to the extent that it operates to invalidate Georgia’s incorporation of 40 CFR 52.21(b)(49)(v) and to effectively remove the paragraph from the Georgia SIP. According to GIEC, the automatic operation of the rescission clause to invalidate Georgia’s incorporation of 40 CFR 52.21(b)(49)(v) is functionally identical to, and cannot be distinguished from, the ministerial action EPA performed in its August 19, 2015 Final Rule. Accordingly, GIEC contends that EPA’s August 19, 2015 Final Rule rendered moot any grounds on which EPA could rely to disapprove Georgia’s automatic rescission clause to the extent it operates to invalidate Georgia’s incorporation of now-vacated and removed 40 CFR

52.21(b)(49)(v). GIEC further claims that EPA’s final rule removing 40 CFR 52.21(b)(49)(v) establishes that the rescission clause’s invalidation of Georgia’s incorporation of 40 CFR 52.21(b)(49)(v) would not contravene 40 CFR 51.105 because such invalidation is consistent with EPA’s interpretation of the triggering action on federal permitting requirements at 40 CFR 52.21.

Response 8: EPA disagrees with this comment. It is not possible for EPA to approve Georgia’s automatic rescission clause only for the limited purpose of enabling the automatic rescission of Georgia’s incorporation by reference of 40 CFR 52.21(b)(49)(v). The plain language of the rescission clause extends well beyond the GHG permitting requirements to encompass “all of any portion of 40 CFR 52.21” that contains the term “subject to regulation” that is impacted by a triggering action. *See* Georgia Rule 391-3-1-.02(7)(a)(2)(iv). As explained above, EPA concludes that it cannot approve this language into Georgia’s SIP because it would allow for future automatic SIP revisions without reasonable public notice as required by CAA 110(l) and without EPA approval as required by 40 CFR 51.105.

Comment 9: GIEC states that EPA’s approval of the rescission clause to the extent that it operates to invalidate 40 CFR 52.21(b)(49)(v) would avoid unnecessary delay in removal of this provision from the Georgia SIP, and that such delay could likely result in confusion on the part of the regulated industry about how the D.C. Circuit’s Amended Judgment affects the PSD and Title V regulations and PSD permitting requirements administered by the Georgia EPD.

Response 9: With respect to GIEC's concern that any delay in removing Georgia's incorporation of 40 CFR 52.21(b)(49)(v) into its SIP could likely result in confusion on the part of the regulated industry regarding applicable PSD permitting requirements, as acknowledged by the commenter, EPA has issued several memoranda explaining how EPA interprets the effect of the U.S. Supreme Court's decision on PSD permitting requirements, and these memoranda are available on EPA's website. Further information regarding EPA's interpretation of the impact of the Court's decision appears in the August 19, 2015, Federal Register notice removing certain vacated provisions from the CFR. *See* 80 FR at 50199. Finally, as discussed above, EPA has announced that it will no longer apply or enforce federal regulatory provisions or the EPA-approved PSD SIP provisions that require a stationary source to obtain a PSD permit if greenhouse gases are the only pollutant (i) that the source emits or has the potential to emit above the major source thresholds, or (ii) for which there is a significant emissions increase and a significant net emissions increase from a modification (e.g., 40 CFR 52.21(b)(49)(v)). Georgia can exercise this same discretion with respect to enforcement of state GHG permitting requirements affected by the Supreme Court's decision (and the D.C. Circuit's subsequent Amended Judgment) that the State has not yet had the opportunity to revise. Regarding GIEC's concerns with respect to the Title V operating permit regulations, EPA notes that today's final action does not impact Georgia's approved Title V program because a state's title V regulations are not incorporated into the SIP and are not subject to SIP revision procedures.

Comment 10: Georgia EPD states that "if the federal GHG rule (or part of the federal rule) is vacated and considered invalid or stayed by the Courts, it should be immediately removed from the Georgia SIP. The state rulemaking process can be time consuming and may

not be capable of responding to judicial, executive (including EPA), or congressional action in time to allow the permitting process to remain consistent with federal requirements. Therefore, Georgia EPD created the rescission clause to ensure that Georgia's PSD rule will be consistent with federal requirements at all times.”

Response 10: EPA appreciates Georgia’s desire to ensure that the permitting requirements in its SIP remain consistent with federal requirements. However, Georgia’s proposed automatic rescission clause would create the possibility that Georgia’s SIP would be inconsistent with federal requirements in the wake of a triggering action. Specifically, Georgia’s proposed rescission clause would revise Georgia’s SIP automatically following a triggering action, without waiting for EPA’s public notice explaining how exactly the triggering action impacts federal requirements. Georgia EPD (and Georgia courts) may disagree with EPA regarding the regulatory changes brought about by a triggering action under Georgia’s automatic rescission clause, resulting in confusion for regulated entities and the general public. This possibility of inconsistency between the Georgia SIP and federal regulatory requirements, and the lack of public notice regarding such inconsistency, makes Georgia’s proposed automatic SIP revision different from other automatic updating mechanisms that EPA has found to be approvable. For example, as Georgia EPD noted in its comments, EPA concluded that the automatic rescission clauses adopted by TDEC and LMAPCD were approvable because under those provisions, no change to the SIP will occur until EPA publishes a Federal Register notice announcing that a portion of 40 CFR 52.21 has been stayed, vacated, or withdrawn. *See* 77 FR at 12485; 77 FR at 62153. Another acceptable approach would be to enable the SIP to automatically update to reflect to the most recent version of 40 CFR 52.21, which is the approach

that EPA takes with respect to Federal Implementation Plans (FIPs) that apply 40 CFR 52.21 in states that have not adopted PSD permitting requirements into their SIP. Under these alternative approaches, regulated entities and the public can be certain that any changes to the SIP resulting from automatic updating will simply reflect express changes to the federal requirements in 40 CFR 52.21, and that there will be no inconsistency between the SIP and federal permitting regulations.

Comment 11: Georgia EPD notes that EPA stated in its proposed action that disapproval of Georgia's proposed automatic rescission clause "does not impose additional requirements beyond those imposed by state law" and "is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.)." However, Georgia EPD believes that requiring PSD permitting requirements for facilities that a court has vacated and considered invalid or stayed does impose additional requirements beyond those imposed by state law and does have a significant economic impact on a substantial number of small entities.

Response 11: EPA disagrees with this comment. EPA's disapproval of Georgia's automatic rescission clause does not itself impose any additional requirement on any regulated entity beyond those requirements imposed by state law. In particular, the rescission clause is merely a procedural mechanism by which requirements that EPA previously approved into Georgia's SIP at Georgia's request would be automatically invalidated in the wake of a triggering action. As discussed above, EPA has determined that it cannot approve this procedural mechanism because it contravenes CAA and regulatory requirements governing SIP

revisions. This action does not impair Georgia's existing ability to request a SIP revision in accordance with the procedures set forth in the CAA and federal regulations. Because EPA's disapproval of Georgia's automatic rescission clause does not impose any additional requirement on any regulated entity, this final action will not have a significant economic impact on a substantial number of small entities. Accordingly, EPA concludes pursuant to section 605 of the Regulatory Flexibility Act, 5 U.S.C. 605, that a regulatory flexibility analysis is unnecessary.

III. Final Action

EPA is taking final action to disapprove the provision in Georgia's January 13, 2011, SIP submittal (at Georgia Rule 391-3-1-.02(7)(a)(2)(iv)) that would automatically rescind permitting-related federal requirements in certain circumstances. Previously, EPA approved the remainder of Georgia's January 13, 2011, SIP revision, which related to PSD requirements for GHG-emitting sources and for the PM_{2.5} NAAQS. *See* 76 FR 55572 (September, 8, 2011). This action does not change what EPA previously approved. EPA notes that this disapproval action does not obligate Georgia in any way to make a new SIP submittal and does not create any potential for sanctions because this provision is not a required element of the SIP.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. This action disapproves a state law as not meeting Federal requirements and does not impose additional requirements beyond those

imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. section 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[insert date 60 days after date of publication in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be

challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Greenhouse gases, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Dated: February 23, 2016.

Heather McTeer Toney,
Regional Administrator,
Region 4.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42.U.S.C. 7401 *et seq.*

Subpart L - Georgia

2. Amend §52.572 by designating the existing undesignated paragraph as paragraph (a) and adding paragraph (b) to read as follows:

§52.572 Approval status.

* * * * *

(b) *Disapproval.* Submittal from the State of Georgia, through the Georgia's Department of Natural Resources Environmental Protection Division (EPD) on January 13, 2011, that would allow for the automatic rescission of federal permitting-related requirements in certain circumstances. EPA is disapproving a portion of the SIP submittal related to a provision (at 391-3-1-.02(7)(a)(2)(iv)) that would automatically rescind portions of Georgia's State Implementation Plan in the wake of certain court decisions or other triggering events (the automatic rescission clause).

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